UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DR. SHIVA AYYADURAI, Plaintiff, v. MICHELLE K. TASSINARI, DEBRA O'MALLEY, AMY COHEN, NATIONAL ASSOCIATION OF STATE ELECTION DIRECTORS, TWITTER, INC., all in their individual capacities, and WILLIAM FRANCIS GALVIN, in his official capacity as Secretary of State for Massachusetts, Defendants.	) Civil Action) No. 20-11889-MLW

* SEALED PORTION OF PROCEEDING REMOVED FROM TRANSCRIPT

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE

VIDEOCONFERENCE
HEARING

August 4, 2021
2:14 p.m.

John J. Moakley United States Courthouse
Courtroom No. 1
One Courthouse Way
Boston, Massachusetts 02210

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P R O C E E D I N G S

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COURTROOM CLERK: Your Honor, the other litigants are in the main session, and we are slowly adding the rest of the public to the public session.

THE COURT: Okay. Please let me know when you've succeeded in that because there are three others, Dilan Esper, Michelle Jeffalone and John Medlar that need to be on.

COURTROOM CLERK: Yes, and I don't see those folks in the waiting room.

MR. AYYADURAI: Your Honor, they're physically in my home. Michelle is my fiance and John is my assistant.

THE COURT: And what about Mr. Esper?

MR. AYYADURAI: He should be coming in online. He's from California.

THE COURT: He should have been coming in online at 2:00. It's now 3:45. What's his number?

MR. AYYADURAI: His phone number?

THE COURT: Yes. I assume, if he's a lawyer, it's a matter of public record.

MR. AYYADURAI: Should I give it to you, Your Honor?

THE COURT: Yes.

MR. AYYADURAI: It's 1-323-839-6618.

THE COURT: Okay. After she calls the case, the clerk will call Mr. Esper and tell him he's --

(Phone interruption.)

COURTROOM CLERK: Your Honor, if he's joining --

THE COURT: What's that?

COURTROOM CLERK: If Mr. Esper is joining by video, then his name should appear in our waiting room, but it doesn't appear that he's called in yet.

THE COURT: All right. So you'll need to call him up after you call the case.

COURTROOM CLERK: Yes.

THE COURT: Please do call the case.

COURTROOM CLERK: This is Civil Action No. 20-11889, *Shiva Ayyadurai v. William Francis Galvin, Michelle K. Tassinari, Debra O'Malley, Amy Cohen and National Association of State Election Directors*.

Participants are reminded that recording and rebroadcasting of this hearing is prohibited and may result in sanctions.

THE COURT: Good afternoon. Let me emphasize the obligation that nobody, including any member of the public, tweet or rebroadcast these proceedings. I've said this at other hearings, and months ago we had a violation. But I'm conducting this hearing by videoconference in part because of the resurgence of the pandemic but in part so it can be accessible to the public, and there are many people, many members of the public who are evidently interested in this and

have joined this videoconference. But if there's a violation of the court rules and requirements in this regard, there won't be any more videoconferences open to the public at least.

I regret the delay in starting this public session, but I've been involved in discussions with the plaintiff, Dr. Ayyadurai, Todd & Weld and Timothy Cornell, and they took longer than I anticipated.

Would counsel please identify themselves for the Court and for the record. And I will say by way of preamble that as a result of the discussions we've had, Mr. Cornell is going to continue to represent Dr. Ayyadurai. Dr. Ayyadurai understands that he's the client, not the lawyer. I have not authorized what's generally called hybrid representation. If he wants to present factual information to the Court which will, unless I'm asked and in advance authorize something else, the information will be provided in an affidavit or in possible testimony.

And I will consider on a case-by-case, request-by-request basis in the context of specific requests whether to let Dr. Ayyadurai speak if this case continues and is not dismissed. And that, as I also discussed, is an open issue, if it's not dismissed as a sanction. But in any event, Mr. Cornell, do you want to identify yourself for the record.

MR. CORNELL: Timothy Cornell of Cornell Dolan for the plaintiff, Dr. Shiva Ayyadurai.

THE COURT: Okay. And I am going to grant Todd &

Weld's motion to withdraw, so why don't we start with what I'll call the Galvin defendants.

MR. HORNSTINE: Good afternoon, Your Honor. Assistant Attorney General Adam Hornstine. My pronouns are he/him/his, and I'm here today on behalf of Secretary Galvin, Michelle Tassinari and Debra O'Malley.

MS. STERMAN: Good afternoon, Your Honor. Assistant Attorney General Anne Sterman, she/her/hers, also on behalf of the same defendants.

MR. MITCHELL: Good afternoon, Your Honor. Nolan Mitchell from Quarles & Brady. I represent the National Association of State Election Directors and Ms. Cohen. Ms. Cohen is here today, as is Keith Ingrim, the representative from NASED.

MS. ELLSWORTH: Good afternoon, Your Honor. Felicia Ellsworth from Wilmer Hale here on behalf of non-party Twitter. My partner Ari Holtzblatt is also here also on behalf of Twitter.

THE COURT: Okay. As I indicated in my August 2 order, docket number 176, and as I amplified in the closed session, I've decided to dismiss the claims against the defendants individually for money damages based on qualified immunity at least and the claim with regard to Count 5, I believe it is, for infliction of emotional distress because it doesn't state a plausible claim. And there may be other

reasons to dismiss some of the claims, except for Count 6.

I will issue a written decision explaining my reasoning, but the only remaining claim is Count 6 as a practical matter and the open question of whether Twitter should be added as a party and related question of whether it can be sued in the District of Massachusetts.

I'll say that, although I received some information under seal, ex parte, that information -- I reached my conclusion before I received that information, and that information is not material or didn't have any impact on my decision. I did have the July 22 memorandum signed by Mr. Cornell on behalf of the plaintiff, which I did consider.

I'll give the plaintiff an opportunity to be heard on this if he wishes, but it's my present intention to strike the proposed revised second amended complaint filed on July 22, because it's signed by Dr. Ayyadurai at a time when he was represented by counsel. That is not permissible under Rule 11(a), and the rule says it must be struck.

However, if I don't dismiss this case, I am going to give the plaintiff a couple of days to file the revised complaint that alleges only the claim in Count 6 and seeks to add Twitter as a party to that claim. And then in my present conception I would decide the Eleventh Amendment issue, which I discussed extensively with you in May and received from the Attorney General a further brief on on June 1, I believe.

So as I said, I'm going to strike it, and when I strike it, I'll put it under seal because, as I did discuss in the nonpublic session, it does include information that shouldn't be part of the public record, the home addresses of the defendants, for example, although plaintiff pointed out to me that that information has been on the public record since his original complaint and this is the first time he says that the issue has been raised. But that's how I intend to deal with that, subject to hearing from you.

Mr. Cornell, do you want to be heard on that?

MR. CORNELL: No. We have no objection.

THE COURT: All right. And do the defendants want to be heard on that, subject to perhaps coming back to it after I hear the argument with regard to sanctions, including dismissal as a possible sanction?

MR. HORNSTINE: On behalf of Commonwealth defendants, Your Honor, no need to be heard further on that.

MR. MITCHELL: Same goes with respect to NASED and Ms. Cohen.

THE COURT: All right. At the moment, Twitter is not a party, but Ms. Ellsworth or Mr. Holtzblatt, do you want to be heard on that?

MS. ELLSWORTH: No need for us to be heard on that, Your Honor. Thank you.

THE COURT: All right. So you have a series of -- do

we have Mr. Esper yet? I'll ask the clerk if she's reached him.

COURTROOM CLERK: Not yet. I did leave a voicemail.

THE COURT: Do you have an email address for Mr. Esper, Dr. Ayyadurai?

MR. AYYADURAI: Yes. Should I give it publicly, Your Honor?

THE COURT: Is it his law firm's email address?

MR. AYYADURAI: I'm not sure if it's his personal. Let me find out.

COURTROOM CLERK: Your Honor, the plaintiff can email that to me.

THE COURT: Why don't you email it to the clerk.

MR. HORNSTINE: Your Honor, if it pleases the Court, his email address, his firm email address is publicly available online. If it would be easier for me to read it to the clerk, I'd be happy to do so.

THE COURT: Go ahead, but if there's a personal email address, the plaintiff should send it.

MR. HORNSTINE: So his firm --

MR. AYYADURAI: I will send it to you, Ms. Loret.

COURTROOM CLERK: Thank you.

THE COURT: Was that his firm email address or his personal email address?

MR. AYYADURAI: I'm not sure if he uses it for both,

Your Honor.

THE COURT: All right. But it's the law firm address?

MR. AYYADURAI: It has that as the suffix.

THE COURT: Right. Harder & Harder?

MR. AYYADURAI: No. Harder LLP.

THE COURT: Harder LLP, okay. Is that the only email address you have?

MR. AYYADURAI: Yes.

THE COURT: And did you tell me earlier today in the closed session that you spoke to Mr. Esper and told him I had ordered you to cause him to attend this hearing?

MR. AYYADURAI: Yes, I told him immediately.

THE COURT: And did he tell you he would do that?

MR. AYYADURAI: Yes. That's what he told me.

COURTROOM CLERK: Your Honor, I have sent the Zoom invitation link to Mr. Esper.

THE COURT: Okay. You should let me know if and when he appears.

COURTROOM CLERK: Yes.

THE COURT: All right. The next item on my agenda is whether to impose sanctions and/or commence contempt proceedings for the violation of my June 16 order caused by the termination of Todd & Weld on about July 13, two days before substantial submissions were due on July 15, and Mr. Cornell's subsequently withdrawn motion to withdraw as new counsel for

the plaintiff.

The background of this is discussed in detail in my ten-page July 16, 2021 order, docket 160, and there's additional relevant orders, my August 3 order, docket 178 -- well, my August 3 order, 178, my August 4 order, 182, and the responses to it.

My tentative view -- well, generally speaking, the legal standard with regard to sanctions, the standards with regard to sanctions include the following: Rule 16(f) of the Federal Rules of Civil Procedure states that, "On motion or on its own, the Court may issue any just order including those authorized by" -- excuse me. I'll ask the deputy clerk, on my screen there's a big green telephone in the middle where the speaker should be, and I think I'm getting some feedback from it. Do we know who that is?

COURTROOM CLERK: Your Honor, it's a member of the public. As members of the public join, for a split second there will be an indication that they have joined, and we are muting everybody.

THE COURT: Well, I don't think that's what that was. But, okay. Let's start again. Thank you.

Rule 16(f) of the Federal Rules of Civil Procedure states that, "On motion or on its own, the Court may issue any just orders, including those authorized by Rule 37(b)(2), if a party fails to obey a scheduling order or other pretrial order.

"Rule 37(b)(2) provides a range of sanctions available to the Court, including dismissing the action or proceeding in whole or in part. Further, instead of or in addition to any other sanction, the Court must order the party, its attorney or both, to pay the reasonable expenses, including attorneys' fees incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

"When confronted with a party's defiance of its management authority, a District Court is necessarily vested with considerable discretion in deciding whether to impose sanctions on that party, and, if so, in determining what form the sanctions should take," as the First Circuit said in *Jones*, 990 F.2d 1, 5.

"However, prior to choosing the harsh sanction of dismissal, the District Court should consider the broad panoply of lesser sanctions available to it, such as contempt, fines, conditional orders of dismissal," et cetera, the First Circuit said in *Crossman*, 316 F.3d 36, 39-40.

"Relevant substantive factors for the Court to consider when weighing sanctions include the severity of the violation, the legitimacy of the party's excuse, repetition of violations, the deliberateness vel non of the misconduct, mitigating excuses, prejudice to the other side and to the operations of the Court and the adequacy of lesser sanctions,"

the First Circuit said in *Vallejo*, 607 F.3d 1, 7-8.

There is also a procedural dimension. "Although Rule 16 and others do not formally require any particular procedure, counsel's disregard of a prior warning from the Court exacerbates the offense, and the lack of warning sometimes mitigates it." That's *Robson*, 81 F.3d 1, 2-3.

So in my July 16 order I put the plaintiff on notice that I would consider sanctions, including possibly dismissal as well as possible contempt proceedings. And I've since received filings from the plaintiff, the Galvin defendants and the NASED defendants, on those issues.

So Mr. Hornstine, would you like to go first with regard to sanctions up to and including dismissal?

MR. HORNSTINE: I would be happy to go first if that is what the Court wishes.

THE COURT: I think so. And there's still information under seal that I've been asked to keep under seal from the attorneys, but one thing that's relevant to possible sanctions is who wrote the July 22 memo, and that's why I felt you essentially had a right to know about the discrepancy of the information I received, and I did discuss that with the plaintiff and Mr. Cornell, and I want to discuss it with Mr. Esper, which the plaintiff has authorized in the closed session.

But I think you should go ahead. I'll hear from

Mr. Mitchell and then from Mr. Cornell, and hopefully Mr. Esper will join so we can get relevant information from him. But go ahead.

MR. HORNSTINE: Thank you very much, Your Honor.

Perhaps before proceeding, might I ask -- and I'm certainly aware of why the Court wanted to proceed earlier this afternoon with the ex-parte under-seal proceedings, but might I ask if at some point portions of that transcript might be able to be redacted and others made public, that would be helpful for counsel to know at some point, but we can cross that bridge another day perhaps.

THE COURT: Yes. In fact, yes. And I think I'd need a motion. I'd have to see what's relevant. You know, I did order the parties to file it under seal. I think implicit in that is the risk that it wouldn't stay permanently under seal. But unless there's some good reason to unseal it, Mr. Cooper at least would prefer the matters remain under seal.

And actually, I mean, my agenda today, maybe I should have laid it out, is to address the sanction issue, including what your reasonable attorney's fees are and what the NASED defendants' are. Because if I find there's no substantial justification for the failure of the plaintiff to obey my June 16 order, the rule says I must order compensation to you, and it's at a minimum what I tentatively intend to do. And again, I put this in my order on August 2, Monday, number 176. But is

there anything that you or any of the other attorneys feel we ought to discuss before we get to the sanctions issue?

MR. HORNSTINE: The only issue that I wanted to raise was the issue that I just raised, the question of whether all or some portion of the proceedings under seal might at some point be unsealed for the benefit of counsel.

THE COURT: We'll see. But in fact, let me tell you all the following. And this was a view that was reached before I developed questions as to who wrote the July 22 memo and got the response from Dr. Ayyadurai who will reiterate, I expect emphatically, that he wrote it, not an attorney. And that could be relevant to what sanction, if any, to impose. But my tentative view is, at a minimum, and this is based in part on what I have under seal, I find that there was no substantial justification for discharging Todd & Weld, and as a result, the failure to obey the scheduling order which the plaintiff knew would occur as a result. That's one. And then I would order compensation to you.

Sanctions can be not just to compensate the defendant. They can also serve a punitive purpose, so I would have the discretion to impose a fine that will be paid to the court. And I didn't read all of the jurisprudence. It's been cited in the submissions. But while dismissal is sort of the ultimate sanction, the Court is not obligated to impose lesser sanctions. Nevertheless, the law and this court generally

prefer that matters be decided on the merits.

So if I don't dismiss the case, it's my present and tentative intention to order the plaintiff to file a revised complaint by next Monday, the 9th, one that realleges Count 6, the request for injunctive relief against Secretary Galvin, making claims that can properly be made under Rule 11(b) and presumably addressing why allegedly there's a continuing violation, not just a past violation, a continuing harm.

Then I would order the defendants to file a renewed motion to dismiss or supplementary memoranda ideally by August 13 and, if not, the 16th, order the plaintiff to respond to the defendants' filings by the 20th or possibly the 23rd with a view to having the hearing start on the 25th and go on the 26th and 27th, what I ordered back in June, possibly in May.

That's my current state of mind. And I've admonished the plaintiff that there are to be no more allegations that include personal information in this case, it would be with regard to Secretary Galvin's home address or photographs, anything like the information in the prior complaints that are going to be sealed, struck and sealed, or anything else that's not permissible under Rule 12.

So that's my state of mind at the moment. Go ahead. You've been waiting a long time.

MR. HORNSTINE: Thank you very much again, Your Honor.

Let me begin with the caveat, of course, that neither

my office nor my clients have affirmatively asked for sanctions, including money to be paid to my office, and that is in part driven by the fact, Your Honor, that neither Ms. Sterman nor I bill our time on an hourly basis. We are, of course, salaried employees of the Commonwealth. And though we are fully prepared to answer the Court's order of August 4 -- excuse me, August 2, today is August 4 -- concerning how much time we estimate that we have essentially worked since the breach of the June scheduling order, I will also caution with the caveat that, because we do not bill our time on an hourly basis, we do not, like Mr. Mitchell or Ms. Ellsworth, bill in six-minute increments to a software. So we have attempted as best as we can to do some archeology through our emails, through our Westlaw logs and the like to come up with an estimate for the Court to the extent the Court wants it. But this perhaps highlights why the nature of our brief that was filed concerning the sanctions issue focuses as it does on dismissal.

The harm that my clients have suffered, not just due to the breach of this scheduling order but for all prior breaches of the rules of this Court, has been that they have suffered the delay of having their motions to dismiss, which were filed as long ago as last December of 2020, including with the assertions of various immunities from suit under the Eleventh Amendment and qualified immunity, those decisions have

long since been delayed by a series of pleadings that keep getting filed, notwithstanding the admonitions of this Court.

And most importantly, not only have the individual defendants had the cloud of litigation over their head for a long time, and I understand the Court's tentative view that it intends to dismiss those claims, but the office, the Secretary has had to spend significant resources not just litigating this case but also dealing with, every time plaintiff files a document that makes these charged accusations, they have to deal with the blow-back that distracts them from their job, which is running fair and safe elections in the Commonwealth.

And although the Secretary has been asserting his Eleventh Amendment immunity and the individual defendants have been asserting their qualified immunity from suit, for many, many months, the Court's resolution of those important threshold issues has been repeatedly frustrated by the violation of the rules.

As a result, Your Honor, plaintiff's actions have caused substantial delay and substantial prejudice to my clients. And this is to say nothing of the bombshell that we received yesterday. And I have to confess that when we saw plaintiff's filing that was perhaps either assisted by counsel from California or ghost-written by counsel from California, and I know I'm not privy to all the facts, but when that was filed, it struck us as odd that the caption that appeared on it

was different than any other caption that plaintiff had previously used before, that the font was different, that the style was different, and it immediately struck us as being suspicious. And only to have those suspicions perhaps confirmed the other day was disquieting, to say the least. So in light of that, and I'm cognizant of the hour, Your Honor --

THE COURT: Let me just pause you for a moment because you're talking about the memorandum of law filed on July 22, 2021, docket 166, so it's signed by Dr. Ayyadurai, not by his lawyer. I noted in the nonpublic session that it didn't read like anything else he had submitted that I've read in about the last nine months, and you point out that the font at least is different, and I hadn't compared them.

MR. HORNSTINE: Well, look at the caption, Your Honor, for docket 166. First of all, it uses parentheses along the right-hand side. Typically plaintiff's filings have a square around it. And it lists Secretary Galvin as being the Secretary of State for Massachusetts; whereas Dr. Ayyadurai typically calls him the Secretary of the Commonwealth. So there are many discrepancies apart from mere style that are here in this document.

And again, the Court knows more than I do, so I want to speak cautiously, and I want to speak carefully and with great solemnity because this is a serious issue, and I know the Court is treating it as such under Rule 37.

THE COURT: Actually, actually, and I think I should tell you that I told the plaintiff in the closed session that he may have a Fifth Amendment right not to answer questions concerning the preparation of that submission because he's told me twice essentially -- well, he told me twice under oath that he wrote it. And I explained that he doesn't have a Fifth Amendment right not to answer a question if he intends to give an intentionally false material answer. But if answering the question would provide a link in the chain proving that his prior response was perjury, then he would have a Fifth Amendment right.

And I also told him that under one of the two federal perjury statutes under 18, United States Code, Section 1621 -- well, under 18, United States Code, Section 1623, there's a so-called safe harbor provision where, in the same continuous court or grand jury proceeding in which a declaration under oath is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if at the time the admission is made the declaration has not substantially affected the proceeding or it has not become manifest that such falsity has been or will be exposed.

There's another statute involving perjury generally, Section 1621, that doesn't have a comparable safe harbor provision, I advised. And in the closed session, the plaintiff

told me he didn't wish to assert a Fifth Amendment right with regard to this. He spoke to the issue, and I believe he's waived any Fifth Amendment right. But if he asserts one, we'll deal with it.

MR. HORNSTINE: Very good, Your Honor. It also drew to mind a comment that the plaintiff made during the May hearing when, in response to a question that Ms. Ellsworth had raised I believe about the hybrid counsel or arrangements concerning counsel, plaintiff volunteered that he was, I believe the word he used was "insulted" that anyone would accuse him of having shadow counsel. And now we learn that that is -- again, the Court knows more than I do, but from what I've seen from the public pleadings, it now seems that that is minimally the case, is that he had shadow counsel.

To what extent counsel was involved in writing or ghost-writing pleadings, that remains to be seen. But my point in raising this all, Your Honor, is that the Court would be fully warranted in dismissing this case. And again, my clients have been asking for this case to be dismissed since last December. Such a response would be warranted for conduct that has unfairly prejudiced the defendants' ability to vindicate their immunities from suit, caused substantial delay to this tribunal and obstructed the ability of the Court to fully and fairly and truthfully resolve this case.

THE COURT: Well, I have told you more definitively

today that I am going to dismiss the claims against the defendants individually for money damages. So only the Eleventh Amendment issue will remain in the case if it's not dismissed. And I expect you'll hear that again the plaintiff is insulted by my having questioned whether he wrote the July 22 memorandum. But he's spoken to it, so I might let him speak to it again, because I have said that in appropriate circumstances I'd let him speak or testify. But why don't you go ahead.

MR. HORNSTINE: Again, the only response is -- perhaps counsel from Mr. Harder's firm in California can shed some light on this matter. I don't know if he's available or not. But again, to get back to the heart of it, even addressing the Eleventh Amendment immunity, this suit and plaintiff's serial violations of the rules has affected a real drag on the ability of the Secretary's Office to do the business of the Commonwealth. This case has been a distraction, again, to say nothing of the harassment and the threats that the office has received that coincide typically --

THE COURT: Do I have -- I think I saw that in your memo. Do I have any affidavit regarding threats or harassment?

MR. HORNSTINE: No, Your Honor. And we were deliberately trying to be circumspect about that. Plaintiff is correct we did not personally object when personal addresses were placed in the record for fear that drawing a circle around

it would further fan the flames.

So again, I've been trying to be circumspect in those pleadings, and I assume Mr. Mitchell will tell you something similar with respect to NASED and his individual client about a similar response.

THE COURT: But basically it's not in your motion.

MR. HORNSTINE: Correct.

THE COURT: If I'm going to rely on certain facts, there should be evidence relating to them in the record. There should be evidence of them in the record, an affidavit or something. But we'll see where all this goes. There are things coming into sharper focus.

MR. HORNSTINE: Thank you, Your Honor. Unless the Court had further questions for me about our hours or anything else, I'd be happy to --

THE COURT: I am interested in your hours.

MR. HORNSTINE: Yes, Your Honor. So Ms. Sterman and I did the best as we could, mindful, as I say, that we don't track our time on like a matter-by-matter basis at the Attorney General's Office.

THE COURT: And this should be hours essentially following my July 16 order.

MR. HORNSTINE: Correct. So following the July 16 order, we had to respond to Mr. Cornell's motion to compel, to meet and confer about that. We've had to file briefs on both

the response to the Court's order asking for my client's views on Rule 37 and Rule 16 issues. We have had to file the motion to strike under Rule 11(a). And most recently we've had to review all of the filings including the 75-page fourth version of a pleading allegedly from plaintiff.

And so, all told, including research, meet and confers, writing, et cetera, Ms. Sterman and I estimate that as of yesterday evening we had worked approximately 25 hours on those matters. That obviously doesn't include the time that we spent today at this hearing or preparing for the hearing today.

THE COURT: And while I might not order that you be compensated at Wilmer Hale rates, although I think the quality of your work seems to be comparable, what do you think the evidence would support as a reasonable rate?

MR. HORNSTINE: Respectfully, Your Honor, I wouldn't even be able to begin to fathom a response. I can tell the Court what I make on an annual basis for my salary.

THE COURT: But I pointed this out in my order. There are cases on this. I mean, this has consumed a tremendous amount of my time, including the last three days and the last month as well.

Just a minute. As I pointed out in my August 2 order, docket 176, if you were a public interest organization like the Civil Liberties Union -- well, here, State-funded entities can be awarded attorneys' fees. In *Blum v. Stenson*, "Attorneys'

fees are calculated according to the prevailing market rates in the relevant community regardless of whether a party is represented by private or nonprofit counsel."

MR. HORNSTINE: Right.

THE COURT: You're essentially nonprofit counsel.

MR. HORNSTINE: Quite correct, Your Honor. So Your Honor, again, with the caveats that I've given, an attorney -- so we have some, I'll call it office guidance based on years of experience. Myself, I fall in the 11- to 15-year band. Generally speaking, we think of that level of counsel for the market rate as being somewhere in the range of 275 to 325 an hour.

Again, I work on a salary basis. My salary information is public. I'm happy to share that with the Court to the extent it is useful.

THE COURT: You can, but that may be low. But anyway -- sure, what's your salary?

MR. HORNSTINE: I make $91,000 a year, Your Honor. Ms. Sterman makes more than I do.

THE COURT: All right. And why is dismissal rather than a lesser sanction appropriate, most appropriate? Because there's a reasonable range of sanctions. Why is it most appropriate in this case based on what we know so far?

MR. HORNSTINE: Sure. And my response to that is twofold. One, if past performance is indicative of what

happens in the future, Your Honor, where the Court has repeatedly admonished plaintiff to stop violating the rules and yet he has continued to transgress them, a sanction short of dismissal will not cease that pattern of behavior.

Second, as I have discussed previously, the magnitude of the harm and delay that has been caused by plaintiff's serial refusal to follow the rules, again, this has thrown this case into turmoil, and it has hampered the Court and the litigants from addressing the central questions of the case. So both because of the magnitude and the pattern of conduct, Your Honor, that is the basis for our submission to the Court.

THE COURT: Well, it's my hope and indeed expectation that if I don't dismiss the case, which is still an open issue, the fact that the plaintiff is now represented by counsel, Mr. Cornell, who has assured me that he doesn't anticipate ever asking to withdraw again and that he'll meet the short deadlines that I just described to you, and the fact that the plaintiff Dr. Ayyadurai is now on even more clear notice that any violations of the rules or of court orders by him or his attorney may very well result in dismissal of the case without regard to the merits and other sanctions, including possible criminal contempt proceedings that could result in incarceration, the past won't be prolog. That's my hope.

And I expect we'll hear from Mr. Cornell and probably the plaintiff. I may let him speak to this, subject to -- or

testify to it. We'll see. Do we have Mr. Esper yet?

COURTROOM CLERK: Not yet, Your Honor.

THE COURT: All right. Mr. Mitchell.

MR. MITCHELL: Thank you, Your Honor. I'd just like to amplify a few points that Mr. Hornstine just made and address your question at the end as to why dismissal is an appropriate sanction here.

To be sure, the Court has advised the plaintiff today about the risk of sanctions and contempt proceedings, but the Court also did it on July 22 in an order and made it crystal clear that further violations would threaten these penalties. And a week later, on July 22, what we see is a complaint that violates Rule 11(a) on its face, that is confusing as to, you know, whether he's a represented party, whether he isn't. That includes even more outlandish --

THE COURT: What do you mean it's confusing as to whether he's a represented party?

MR. MITCHELL: Well, it was unclear to me when I saw a series of filings, some of which were by his counsel and some of which were by the plaintiff, as to what was going on. And I think I can infer why there wasn't an attorney signature on certain documents, but we didn't know, and it was frankly confusing. But it also shows a real disregard both for the rules and for all of the Court's effort over the course of three hearings in May and June to give him a roadmap

essentially of the way to press the claims. And given that, he made a choice to pursue conspiracy theories and the RICO claims and move farther and farther away from the issues that had been discussed at length in May and in June.

THE COURT: Actually, there's one thing I haven't stated today. It will be in my written decision dismissing all but Count 6 for qualified immunity or other reasons. Every single claim against the defendants individually in both the existing complaint and the most recent proposed revised complaint is for money damages and only for money damages. I rechecked all of that today. And is that the way you read it as well?

MR. MITCHELL: It is, yeah.

THE COURT: So that's the point, and there's not a violation of clearly established law, so the defendants, including, in my analysis, NASED is as an organization entitled to qualified immunity, which doesn't necessarily mean it would be entitled to Eleventh Amendment immunity.

MR. MITCHELL: Although I would appreciate the opportunity to --

THE COURT: Of course, of course.

MR. MITCHELL: -- briefing --

THE COURT: Of course. I probably shouldn't have even said that. But I'll write about this when I can. But anyway, keep going. This is helpful.

MR. MITCHELL: And I do appreciate the efforts the Court has made to narrow the complaint down to the noninflammatory allegations and the claims that we have discussed at length, our legal claims and not conspiracy-type claims.

But the other piece to this is what's really a unique prejudice that has been the result of what is months of conduct that Mr. Hornstine just discussed about generally disregarding rules, confusing the record, making all sorts of outlandish allegations against real people at every opportunity. And my clients have been unable to vindicate their rights and their names, and it results in real world prejudice because these are highly charged issues in this climate.

And when this is publicized, you know, Ms. Cohen has been characterized as some sort of racketeering -- you know, if you read through the proposed amended complaint, it really is outrageous some of the things that are said without any basis. And that has resulted in real threats.

Just since last Thursday, I think there have been two separate reports to the FBI by NASED for things that come in either over Twitter or directly to NASED that contain very, very thinly veiled threats, having to put these in an affidavit to the Court if they would want them, these have arisen after --

THE COURT: Well, I think if you want me to rely on

that, it will have to be in an affidavit. Then we'll have to see if it's disputed. And in a lawyerly way, you're using lawyerly language. It's less lurid than some of the plaintiff's, but you say the claims are outlandish. Whether or not they're meritorious is what this case should be about.

Putting aside, you know, labels as you've discerned, I think embedded in this case are some serious issues. They're in an unusual context, which is the reason that there's qualified immunity. But the heart of the case, the kernel of the case is whether there's been a violation of the First Amendment because of either coercion or perhaps more likely allegedly close collaboration between election officials, whatever the motive is, and Twitter, which, for many purposes, is a private entity but would be subject to the First Amendment if it was working sufficiently closely with government officials to essentially have been an agent and doing something the government couldn't direct. So ideally that would have been the focus of this case in the last nine months. And if I didn't dismiss it, there would be discovery to determine -- and the plaintiff does keep finding things out that add to the mix of information on the issue. I haven't been able to decide whether the case should be dismissed based on Eleventh Amendment immunity or anything else. And as I described in May and again somewhat in June, that's a complicated issue.

MR. MITCHELL: Your Honor, we would be happy to

address those issues on a motion to dismiss and have a response to those and have been trying for months.

THE COURT: I know, and if I don't dismiss the case as a sanction, and the way this is developing, including Mr. Esper's absence, there may be parallel tracks. I may take this dismissal as a sanction under advisement until the record gets more complete and have you brief -- have you get a new complaint in the next couple of days and then file a motion to dismiss addressing the Eleventh Amendment issues that I discussed on May 21 and subsequently I may in an order remind you of, and then we'll see if we even need the August 25 hearing.

If the case gets dismissed, that won't be necessary. If the case doesn't get dismissed, it will be, and we'll have the hearing on the schedule that's important to the defendants and important to my managing my docket. Go ahead.

MR. MITCHELL: And I'll just add that, you know, the reason that I was articulating the challenges and some of the prejudice that is unique in this is just to emphasize that, you know, it has not simply been cost and time, although it certainly has been that, in terms of both the violation of this order but the long history before it.

And it's the notion that even as of yesterday, right, when we've had sanctions motions, requests for information about the issue with respect to the legal memorandum, we get

another affidavit, you know, that just goes on and on and on for pages and contains even more of this stuff. And it's an obstinate conduct that just has not complied with basic obligations. And the fact that it has happened despite warnings about sanctions and even as recently as last night suggests that more than an award of fees would be appropriate, and that, you know, dismissal is, in this case, the right result.

THE COURT: Here. Two things. One, I'm ordering that if the NASED defendants, I'll call them, or the Galvin defendants want to supplement the factual record with regard to sanctions to provide information concerning threats or alleged threats or whatever, I'm ordering that you do that by 12:00 on Friday, which will be the 6th.

MR. MITCHELL: Understood.

THE COURT: I prefer to have it tomorrow if it's possible, but I want to give you enough time to think about it and do it carefully.

MR. MITCHELL: Thank you. There are some sensitivities presented, some of it may be more appropriate under seal.

THE COURT: If you think there's a proper basis to impound it under Rule 7.2, you may do that. But based on what I know now, not ex parte. You'd have to serve it on Mr. Cornell --

MR. MITCHELL: Correct, yes.

THE COURT: -- as well as the other parties. And that may be -- and I'll authorize you to file it under seal if you think there's a proper basis with a redacted version for the public record. But anything I take under seal should be considered only temporarily under seal, because then I'll have to consider the sort of what I call the *Standard Financial Management* factors.

It's a 1986 case in the First Circuit about the presumption of public access, but in cases, many cases there are privacy concerns and other concerns that can outweigh the common law presumption of public access to documents under which judicial decisions are made.

Another one is *Kravetz*, which is a criminal case, but it's got a nice discussion of what some of the countervailing considerations will be. And I've written on this repeatedly and recently. Anyway, this is helpful. Go ahead.

MR. MITCHELL: And I understand the challenges with documents filed under seal, and to the extent there's a way to avoid it, I will, and I also want to make clear that I need to talk to my client to make sure that this doesn't create other concerns. And if we're not going to file one and know that before Friday, I'll inform the Court.

THE COURT: Okay. Well, that's a good refinement. I'm ordering that you either file it by noon on Friday or file

a statement that you don't wish to supplement the record.

MR. MITCHELL: Certainly.

THE COURT: This is the same of course for the Attorney General -- I mean the Galvin defendants.

MR. MITCHELL: And I think that the basis for sanctions has been laid out. I think the Court certainly has the authority to do it, the discretion to do it.

I can tell you, with respect to your questions as to time, I spent approximately 20 hours as well responding to this as of yesterday. I do have time sort of entries, and to the extent further granularity is required, I can do that on an ex-parte basis. You know, my sort of standard rate is 475 an hour. I can tell you that for NASED it's an extreme discount, given that there are the issues in the case and they're a nonprofit but --

THE COURT: 475 is what you charge NASED?

MR. MITCHELL: No, that's not what I charge NASED. NASED gets an extremely -- it's the lowest rate in my 15-year career that I've charged anyone.

THE COURT: What do you charge NASED?

MR. MITCHELL: It's 250.

THE COURT: And I don't know that it would be ex parte. I think I should order you and the Attorney General to file an affidavit with your time and what you propose is a reasonable rate. And I don't think you're necessarily limited

to what you charge NASED, but that may be some evidence of what's reasonable, although you've provided a discount. There --

MR. MITCHELL: I have --

THE COURT: -- organizations that don't charge anything. You know, they get what is the rate in the community. If you want to know about attorneys' fees, you can read my February 27, 2020 decision in *Arkansas Teachers*.

MR. MITCHELL: I am familiar --

THE COURT: Too bad that you've had to do that. All right. This is very helpful. Is there more?

MR. MITCHELL: Unless the Court has questions, I think the gist of the argument has been presented.

THE COURT: I don't think so. Let me take a very short break, five minutes for the court reporter and myself before I hear from the plaintiff with regard to sanctions.

And in this five minutes, Dr. Ayyadurai should find Mr. Esper, because his absence is impeding the progress of this. Okay? Court is in recess, say, until 5:00.

(Recess, 4:52 p.m. - 5:00 p.m.)

THE COURT: Everybody who is not a lawyer should be on mute. Because I'm hearing somebody. Ms. Loret, are we ready to proceed?

COURTROOM CLERK: Yes, Your Honor.

THE COURT: Dr. Ayyadurai, did you reach Mr. Esper?

MR. AYYADURAI: Yes. He said he's going to be directly communicating to the Court, Your Honor.

THE COURT: No. Is he joining the conference?

MR. AYYADURAI: I asked him to join. He said he's going to be directly communicating something to Ms. Loret. That's what he told me. I asked him to join, yes.

THE COURT: Okay. Because that's not consistent with my order. But if necessary, I'll issue an order. Since he's working in concert with you, he's subject to my orders, so we'll have to hear from him another time if we don't hear from him today.

Okay. Mr. Cornell, would you like to speak to the issue of sanctions?

MR. CORNELL: So my understanding from Your Honor's order of July, I believe it was the 16th, was that the issue of sanctions was going to be premised upon Dr. Ayyadurai's supposed cause -- that he supposedly caused your June 16 scheduling order not to be met, and that's what the sanctions were about. That's my understanding.

THE COURT: This is a useful observation. That was my intention on July 16, and you should address that. The question I raised about who wrote the July 22 memorandum is new. And as a practical matter, it's 5:00 Eastern Daylight Time, and Mr. Esper is not on the line, your client failed to cause him to join at 2:00, although it may have been beyond his

control. And to the extent that implicit in your observation is that you ought to have notice of an issue before I act on it, that's my approach to things.

Although I'm extremely busy, my present intention is, because it's relevant, to do what's necessary to get the information I need to make a decision as to whether there's any sanctionable conduct relating to the preparation of the memorandum, but not at the expense of that briefing schedule I explained to you earlier.

So you can at least start by addressing, you know, whether the failure to obey my order by making filings on July 15 is sanctionable, and if I conclude it is, what the most appropriate sanction is, and then I think we may, since we're here and since your client and to some extent you addressed this issue in the nonpublic session, I think I'll give you each an opportunity to preliminarily address the issue of the memorandum and go from there. Otherwise, I might unseal that discussion. I have to figure out which way to deal with it.

But go ahead, why don't you address the issues that were raised by my July 16 order.

COURTROOM CLERK: Your Honor, excuse me.

THE COURT: Excuse me.

COURTROOM CLERK: I don't mean to interrupt, but I did receive an email from Mr. Esper, if Your Honor would like me to read it?

THE COURT: Please do.

COURTROOM CLERK: "Ms. Loret, I received your Zoom invitation. Please convey the following to the Court and the parties: Apparently, this morning the Court issued an order that all persons who assisted on plaintiff's legal memorandum attend and potentially give sworn testimony. To be clear, I did not write plaintiff's legal memorandum. Plaintiff did. My understanding is that plaintiff has informed the Court of this fact. However, I cannot attend today's hearing. I am not counsel of record, and I'm not a practicing lawyer in Massachusetts and thus cannot appear in the case. I am also not a material witness. Any knowledge I might have of communications between me and plaintiff would be protected by plaintiff's lawyer-client privilege. Signed, Dilan Esper."

THE COURT: That's fine. We'll make that part of the record, and I'll issue another order for Mr. Esper. And the attorney-client privilege, as I discussed with the plaintiff in the closed session, is the plaintiff's. He has, in my view, waived that privilege. And Mr. Esper is a material witness. He's not appearing, being asked to appear as a lawyer. He's a fact witness.

So while this is further disruption of my busy docket, he'll get an order. And if he doesn't obey it, he'll be subject to contempt. While I'm thinking of it, I'm ordering the parties to order the transcript of today's proceedings, the

sealed portion and this portion, on an expedited basis.

Mr. Cornell, go ahead.

MR. CORNELL: Yes. So since the issue of sanctions is limited to your July 16 memorandum, I take it then that --

THE COURT: In the first instance. But go ahead, address that. As I just said a few minute ago, I may want you and your client to reiterate what you said to me about the memo in the private session. Go ahead.

MR. CORNELL: Okay. But to the issue of what the defendants were supposed to be speaking about, 90 percent of what they had to say was irrelevant because they spoke to items such as the outlandishness of the claims, what was contained in the complaint. That is not what the Court's concern was about. The Court's concern was about Dr. Ayyadurai's supposed causation of the failure to meet the scheduling order.

And on that note, I just want to say, as a lawyer, and I would think that most lawyers would join me, most serious issues in the case only come to a crisis point in the final week before filing. I mean, that's the way business is routinely done.

And by putting this sort of in terrorem notion of sanctions into Dr. Ayyadurai's decision that the case was going in a different direction than what he, the author of the case, wanted it to, I mean, you know, in the end, the plaintiff -- it is the plaintiff's case, and he should have the right to the

counsel of his choice.

THE COURT: And I think most lawyers and your clients should have known that they don't have the right to arrogate to themselves what the Court's schedule is going to be, and your client, under seal, was told on July 9 by Mr. Cooper what claims Mr. Cooper would file and what claims Mr. Cooper wouldn't file. And I didn't get the motion to continue or to expand the schedule in advance of the deadline. I'll have to check and see when you filed it, but I believe it was on the 15th. If it wasn't, it was on the 14th. And that's not the way the world works.

Your client had notice of the importance of certain issues in May, the value of having a lawyer, but whatever it is, there's a reason that the local rules require leave of court when matters are scheduled. And I don't want to, by listening silently to you, undermine what I've written before and prompt you or your client to think that if you want relief from a court order, you don't have to -- ask for it far enough in advance and present good cause so if the Court denies the request, you'll comply with the order.

And I usually -- well, I'm always reasonable with regard to the way I respond to requests, but reasonableness includes considering the defendants' interests and considering my strong interest in managing my docket. Go ahead.

MR. CORNELL: I think if you have a July 9 email from

Todd & Weld, kind of laying out an ultimatum, that gives the plaintiff I think like three or four days to decide, you know, sort of the crisis point in the case. I mean, I don't think that's unseemly, let alone sanctionable.

THE COURT: What's sanctionable is disobeying, causing disobedience of a court order and disobeying a court order. And I mean, I assume you've read -- if you haven't, you should -- the transcripts from May 20 and 21 and from June 15 I believe it is. Because I laid out the serious issues and emphasized, and you know this, the importance that any allegations that are made, yet another proposed amended complaint, and any other submission, comply with the requirements of Rule 11, including Rule 11(b). So anyway, go ahead.

MR. CORNELL: Yes, okay.

THE COURT: And essentially the schedule I set was set in consultation with Todd & Weld. The plaintiff was on the line. And the issues on which there are disagreement are exactly issues I essentially identified or anticipated, expected would be worked out. Go ahead.

MR. CORNELL: So I mean, so the certainty of the issue is, what was Dr. Ayyadurai to do faced with a few days left to maneuver? And yes, you know, Your Honor had laid out the case. But, you know, Dr. Ayyadurai, who I would request that the Court hear from him on this issue, felt that he had no choice

and no time in which to maneuver. Can Dr. Ayyadurai speak to this?

THE COURT: Well, why don't you finish, at least subject to hearing from him.

MR. CORNELL: Okay. Why don't I finish. So that's as far as the issue itself. As to the sanctions, you've heard from the state this court has, you know, made national note on its issue of phantom attorney billing, and the state asked you for attorneys' fees on my supposed phantom motion to compel. I've made no such motion to compel. I don't know what those fees would be charged for.

THE COURT: Motion to compel?

MR. CORNELL: Yes, that's what Mr. Hornstine told the Court.

MR. HORNSTINE: Your Honor, if I may interject. It was pointed out to me during the recess I said "motion to compel." I misspoke. I meant to say "motion to continue," and I apologize for any confusion.

THE COURT: Thank you for that clarification.

MR. CORNELL: I'm sorry. So I think that on the issue of the amount of sanctions themselves, I would ask the Court to reserve, you know, so that we can actually examine what it is that's at issue.

THE COURT: You mean how many hours and what the reasonable rate would be?

MR. CORNELL: Yes.

THE COURT: And you should confer on that. Are you charging your client?

MR. CORNELL: I am.

THE COURT: How much?

MR. CORNELL: 450 an hour.

THE COURT: So it's very likely I would choose that as a reasonable rate for the other attorneys. So talk about it. And you're not agreeing that I should sanction them, but you can discuss the reasonableness of the hours and what a rate would be and what I ought to award, and maybe they'll agree to less, but you're not agreeing that there should be a sanction.

MR. CORNELL: No. I was simply -- the Court moved on from there what the sanction should be, and I'm disagreeing with that as well.

THE COURT: What's that?

MR. CORNELL: Just simply, when you heard from defendants, you moved from whether sanctions should be imposed to what the actual sanctions should be, and I was simply disagreeing with that.

THE COURT: Well, I assume it's your position there should be no sanction.

MR. CORNELL: Absolutely, absolutely, yes.

THE COURT: But this has to be in the context, was there a substantial justification.

MR. CORNELL: Right, exactly.

THE COURT: All right. Ordinarily if your client wanted to provide any evidence on this issue, he'd be questioned under oath and subject to cross-examination. So I think at a minimum I should put him under oath and maybe let you ask him some open-ended question. And then the defendants will have a chance to ask some questions, and I may have some. But hopefully it will elicit the pertinent part of what we discussed earlier.

And I mean, this is a fluid situation since he did waive any attorney-client privilege that he might have had with regard to discussions with Mr. Esper. I think it might be valuable to get that reiterated for the public record. And, you know, he wanted to tell me, and he wasn't asserting a Fifth Amendment right, so I believe since this is the same proceeding, he's waived any Fifth Amendment right he may have had. And when you waive the attorney-client privilege, that's permanent, not per proceeding or limited to a proceeding.

So would the clerk please administer the oath to Dr. Ayyadurai.

SHIVA AYYADURAI, SWORN

THE COURT: Okay. Mr. Cornell, would you like to put the first question to the plaintiff, please.

MR. CORNELL: Yes.

EXAMINATION BY MR. CORNELL:

Q. Dr. Ayyadurai, could you describe your decision tree leading up to your decision to dismiss counsel.

A. Yes. The decision tree was based on the fact that this case, this lawsuit, as the Court knows, has been discovering material fact in an evolutionary process.

As we know, on October 30, we discovered that the Twitter partnership portal was created, which the defendants concealed to this Court. Then on May 19, I submitted playbooks to this Court which showed that the defendants were working in concert to violate the First Amendment. And then on June 29, I discovered the Long Fuse report which confirms that I was being surveilled, blacklisted, by the enterprise created by these defendants who so want to seal it.

So on July 13 -- and by the way, I don't remember myself availing myself of attorney-client privileges, Your Honor. But to be clear, it was on July 13 I documented very honestly, ex parte, under seal, pro se, as a plaintiff, I thought that was completely under seal, and I wrote you a very detailed memo --

THE COURT: I'm sorry. On July 13?

MR. AYYADURAI: Yes, on July 13 is the first time I received a version.

THE COURT: I'm sorry. Did you file something on July 13, or are you talking about something you filed --

MR. AYYADURAI: You said July 9, that I asserted something. On July 13, 72 hours before the 15th, was the first

time I received a version of the complaint. And that complaint, that was a time that I am told that the RICO civil complaints must be dropped, and it was basically, "Drop all the claims or drop us." I chose to drop my attorneys, and I have every right to do that.

Because what has evolved in this case over the last nine months is a clear recognition that these defendants have worked together to create an infrastructure to silence the speech of every American.

And as a U.S. Senate candidate -- let me bring this back to the point. I was running for United States Senate in the United States of America, which still has the First Amendment, and these people conspired against me, and they created that infrastructure which is confirmed in the Long Fuse report that is out in the public domain right here.

And I, using my skills as a systems engineer, put together a diagram with the help of volunteers, not with the help of any lawyers. Every line in that diagram is publicly available. Every picture is publicly available for everyone in the world to see. It is a course I used to teach at MIT called systems visualization. I put that diagram together, I submitted it to the Court in a complaint I solely wrote in a memorandum of law I solely wrote.

The boon that these defendants have right now is the fact that I terminated my relationship with my attorney. My

attorney, Tim Cornell, in a conferral with Mr. Mitchell and Hornstine made it very clear: Please give me more time. They had no issue with extension. They said, "We'll give you the six weeks, provided you drop the monetary damages claim." They were negotiating with us. They had no issue with extending up to six weeks. And I want to make that very clear.

So they stand here today whining about one week when the reality is that they do not want the Long Fuse report out there. They do not want the infrastructure that this lawsuit has uncovered, this Court has uncovered, which shows that what is going on in the United States is beyond belief. The reason my parents came to this country --

THE COURT: Okay. Stop. Now, when you --

MR. AYYADURAI: So --

THE COURT: Stop. Do you hear me?

MR. AYYADURAI: Yeah.

THE COURT: Just one minute. I think in fairness to the defendants who will get a chance to question you about this and make certain arguments, just so the factual record is clear, in docket number 162, under seal, the affidavit that you filed on July 20, 2021, in paragraph 17, you told me you had a meeting with Mr. Cooper or at Mr. Cooper's office so you could explain to Mr. Cooper and the team all the salient points.

And then in paragraph 18 you said, "Immediately after that meeting, Mr. Cooper and his team declared that there was

no way I could support monetary damages claims against the individual defendants. I asked Mr. Cooper if he had done the extensive case law research necessary prior to arriving at this conclusion. Mr. Cooper assured me that he had."

Paragraph 19. "Based on this assurance, I tentatively agreed that they could revise the complaint to include only the official capacities provided they sent me the case law." Bolded and underlined.

"However, within minutes of my leaving that meeting, Mr. Cooper and his team emailed defendants' lawyers that I had dropped all monetary claims against the individuals. They did not inform me that they were sending this email, nor had I agreed to drop the claims without reviewing the case law. Mr. Cooper's team then forwarded to me that email as a fait accompli after the defendants had already been informed."

So that's why I said that it's my understanding that you knew on July 9, before July 15, that I had admonished the lawyers and that all filings had to have a reasonable basis in fact and law under Rule 11 and that I had tentatively concluded that the defendants would be entitled to qualified immunity, something I have now concluded and will explain. It's something you'll get a chance to write.

That didn't eliminate -- that doesn't eliminate, unless something else does, your right to claim that Twitter and Galvin and NASED collaborated to a sufficient extent to

make Twitter a state actor for First Amendment purposes. And I think you know that. I've been saying it repeatedly. I've been trying to get this case focused on what you ardently argued you're primarily concerned about.

But in any event -- and these are just statements that Mr. Cooper hasn't responded to, and the fact that I'm putting them in the public record doesn't mean they're correct. It just means that I think the defendants are entitled to know what you said on the point.

Do you have another question, Mr. Cornell?

MR. AYYADURAI: I didn't finish the timeline that Mr. Cornell asked for, Your Honor, so it's accurate for the record.

THE COURT: But here, I'll tell you something. Just take a deep breath. Give me factual information. When you go beyond what the question asks, for example, telling me about being born in India, it has nothing to do with this issue, and I'm going to require that we do this in an entirely conventional way; that Mr. Cornell, who is your lawyer, not ask leading questions but ask questions that put the defendants on notice so they can object if they think the answer is not relevant or it's otherwise objectionable. Do you want to --

MR. AYYADURAI: I'll tell you -- I'm sorry.

THE COURT: Go ahead. Within those limitations, do you want to say more about --

MR. AYYADURAI: Yes, Your Honor.

THE COURT: -- leading up to terminating Todd & Weld? And, you know, you've told me you knew that would delay the timeline. And the defendants are going to argue, because it's true, you've just said it, they agreed not to oppose an extension, they know it's up to me, the parties can't alter a court order by agreement, if the claims against the individuals would not be included in a revised complaint because that's been their concern consistently. But go ahead.

MR. AYYADURAI: Your Honor, my position has been it's for this Court to decide, not even me or my lawyers, and that's why I did not drop my claims.

THE COURT: All right.

MR. AYYADURAI: On July 13 --

THE COURT: Let me just stop you on that. I don't know how many times I need to repeat this. Neither a lawyer nor you is entitled under Federal Rule of Civil Procedure 11(b) to make a claim unless the lawyer in good faith believes there's an adequate factual and legal basis.

If your lawyers, experienced lawyers agreed with my tentative view that they could not properly make an argument that the defendants are not protected by qualified immunity, no matter how ardently you would like them to make that argument, they can't ethically make it. But go ahead.

MR. AYYADURAI: Your Honor, I never asked that of my

lawyers for the record. Let's be clear. I asked the lawyers to produce me the memorandum of law. I never got that until after I fired my lawyers. Let me state that again for the fact. This is a fact. I am a scientist. I'm an engineer.

THE COURT: Stop.

MR. AYYADURAI: I live by the law.

THE COURT: You said that, you said that.

MR. AYYADURAI: I asked the attorneys for the memorandum of law. In fact, on the record, Mr. Esper contacted Mr. Cooper and said, "Please do the research before you drop any claims." It was after I terminated them, then I got a draft, a draft, which was a garbage draft. Excuse my language.

I'm not a lawyer, but I can tell you it was incomplete, and it was done after I terminated them. Throughout my entire interaction, I wanted to see the case law. I have a right to that.

So I agree with you. I never got that because it was a priori decided that these are the claims that would be accepted and not -- without providing the case law. As I understood the reason -- as a pro se person, I filed everything on time. I have not breached any of the rules of this court.

THE COURT: Okay. This is a different point. Maybe Mr. Cornell would like to ask you about it. It can be relevant to the issue of sanctions, but it's not responsive to what he asked you. Mr. Cornell, do you have another question?

BY MR. CORNELL:

Q. Just to focus on my original question, though, so when it came time when you had to decide what to do, to fire counsel or go with their streamlined strategy, what were the alternatives that you felt you had in place?

A. I never wanted to -- the ultimatum was given to me: Drop us or drop these claims. It was an ultimatum given to me on July 13 -- on July 12, and I chose to drop my lawyers.

Q. So Judge Wolf has July 9 --

A. July 9 is not the point. July 9 we had a conversation about qualified immunity, and I said, "Produce me the case law." The attorneys, as I put factually, truthfully, they proactively sent, without my authorization, without producing any case law -- to this date, I have not gotten any case law.

Q. Okay. So until the final week, you didn't have enough information on which to make a decision?

THE COURT: Excuse me.

A. July 13 is when I first heard they wanted to drop the RICO claims, which I was adamant about keeping. That's the first time I heard that, Tim, that they wanted to drop them. They weren't going to include them. And, you know, "Go with this. My way or the highway." It was unfortunate.

That was on July 13, 72 hours before. They gave me no choice. They drew the line in the sand. From the discoveries I made with the Long Fuse report and everything, on principle I

was not going to let the defendants get away because there is a civil RICO conspiracy that was utilized against me. It is an enterprise. Ms. Cohen is part of that enterprise.

THE COURT: That's not --

MR. CORNELL: I have no further questions.

THE COURT: Let me ask you this. On July 22, I believe it is, Dr. Ayyadurai, you filed a proposed revised complaint, correct? You signed it; is that right?

MR. AYYADURAI: Yes, Your Honor.

THE COURT: And does that include the claims that you hoped Todd & Weld would make?

MR. AYYADURAI: Yes, Your Honor.

THE COURT: Okay. All the claims you hoped they would make?

MR. AYYADURAI: All the claims that I hoped they would make, along with the appropriate memorandum of law.

THE COURT: And I've read that, particularly the pertinent part several times, including today. All the claims seek only money damages as relief against the defendants individually in every count, except Count 6, which seeks injunctive relief against Secretary Galvin. Did I read the revised complaint correctly?

MR. AYYADURAI: Yes, you did, Your Honor.

THE COURT: And the complaint that's pending now with regard to the claims against the defendants individually, which

include a RICO claim and a RICO conspiracy claim, the only relief requested is money damages. Is that correct?

MR. AYYADURAI: In the civil RICO, you're absolutely right, Your Honor, yes.

THE COURT: Well, with regard to all of the claims, except Count 6, the relief that's sought is money damages against the named defendants individually, correct?

MR. AYYADURAI: Yes.

THE COURT: Okay. Would defense counsel -- or Mr. Cornell, do you have any further questions on this line?

MR. CORNELL: Not on this line, I do not.

MR. AYYADURAI: Your Honor, I would like to just make one point.

THE COURT: Well, you're supposed to answer questions. What does the point relate to?

MR. AYYADURAI: The point relates to the lie that Mr. Hornstine just made about the caption in this case.

THE COURT: Excuse me. We'll get to that separately. Okay?

MR. AYYADURAI: Yes.

THE COURT: Mr. Hornstine, with regard to the testimony we've heard so far, would you like to cross-examine him?

MR. HORNSTINE: Your Honor, before proceeding, I'd like to reiterate my request that the affidavits that were

filed under seal be unsealed in light of this testimony. I'm certainly happy to proceed today, but in light of what appears to be a waiver of any attorney-client privilege, I don't know how I can do a credible and thorough job on behalf of my client with a cross-examination in the absence of that.

THE COURT: And we still have Mr. Cooper, I assume?

MR. COOPER: We do, Your Honor.

THE COURT: Would you like to express your immediate reaction to that request, which may not have to be your eventual reaction?

MR. COOPER: Your Honor, for the reasons previously stated, I think it frankly is in my former client's best interests that all of the affidavits remain under seal. And as I said, I have a number of concerns with the -- I don't believe I'm subject to the attorney-client privilege anymore, but I should stop here and ask Dr. Shiva whether he asserts it before I say anything else.

MR. AYYADURAI: Yes, Howard, I completely assert my attorney-client privilege. I've never waived it. I also agree with you --

THE COURT: Well, when you testify voluntarily about your communications with your lawyer, you waive the privilege. And for some reason you nevertheless refuse to answer relevant questions on cross-examination. One remedy is for the Court, me, to strike your testimony.

All of this unfortunately distracts from the issue you've raised and I think is at the heart of your concerns and engaged my attention in why I thought you would benefit, I think you would benefit, from being represented by counsel, and that is whether the Eleventh Amendment bars this case and whether Twitter -- two issues. Whether Twitter can be made a party and required to litigate in Massachusetts. But when you voluntarily discuss your communications with Mr. Cooper, you've waived your privilege with regard to that. That's the law.

MR. HORNSTINE: And Your Honor, leaving aside just getting access to the documents that were filed under seal, that those should be unsealed, the testimony or the argument that was made earlier today should be unsealed, and to the extent there's any ambiguity at all, this Court should or at least is empowered to ask for the emails between Todd & Weld and plaintiff or Mr. Esper and plaintiff. And I for one would be curious to see the metadata that underlies the document that ultimately becomes --

THE COURT: That's a different issue.

MR. HORNSTINE: It will very quickly resolve --

THE COURT: You've made the request. I'll think about it. But let's go a little further.

MR. CORNELL: Can I just --

THE COURT: Okay --

MR. CORNELL: -- quickly add to Mr. Cooper's --

THE COURT: Yes, go ahead.

MR. CORNELL: Knowing what I know about what is under seal and what was discussed in camera and knowing what was discussed in public, I don't believe that any of the defendants are at -- they know exactly what the issues are. They're at no hardship. And I don't think any kind of unsealing is justified on that basis.

THE COURT: All right. This is not going to be the end of the inquiries, and I really, as long as I haven't dismissed the case, I'm going to establish a schedule that will permit me to conduct the August 25 hearings if the case isn't dismissed.

But there is the issue of whether Dr. Ayyadurai wrote the July 22 memorandum of law that he signed and was filed by you on his behalf on CM/ECF, and that was discussed in the closed session. I explained to him that he might have a Fifth Amendment privilege, and he told me that he didn't want to assert a Fifth Amendment privilege, and he discussed the preparation, and he didn't assert any attorney-client privilege.

And this is, although not something that was or could be known when I issued my July 16 order as it relates to a document filed on July 22, it should have been filed on July 15, according to my orders, I'm inclined to have you ask Dr. Ayyadurai about who wrote that document.

If you think there's some privilege, tell me, and then that will be part of the public record -- well, some of this is on the public record because he's filed several affidavits, and then we'll see where we go from there. Because I think Mr. Hornstine doesn't want to ask any questions about what we've heard so far until we hear that, and I'll leave that open.

But Mr. Cornell, do you want to ask Mr. Ayyadurai about the preparation of the July 22 memorandum of law that he signed?

MR. AYYADURAI: Where is Mr. Cornell?

THE COURT: That's a very good question.

He's reconnecting I think. Mr. Cornell, it looks like you got disconnected for a bit. Did you hear me ask whether you -- in view of the fact that Dr. Ayyadurai said he didn't want to assert a Fifth Amendment privilege and testified and didn't assert any attorney-client privilege in the closed session, I think it would be helpful to the progress of this, because while it's not an issue that was raised in my July 16 order, it couldn't be because it relates to a memorandum filed on July 22 that should have been filed on July 15, would you like to ask him, basically cover what was covered in the closed session concerning the preparation of that memorandum, the draft of that memorandum, and then that may be subject to some questions from defense counsel. That may be as far as we can

get today.

MR. CORNELL: Okay. I'm sorry, I'm doing this from my iPhone so that it will be more stable, so I can't see Dr. Ayyadurai. I can only see you, but it's okay.

THE COURT: I think you might see him in a minute. I don't know if you can put it on speaker view, but then you'll see him, if you can.

BY MR. CORNELL:

Q. Dr. Ayyadurai, did you write the memo in question?

A. Yes, Tim, I wrote it. I authored the memo in question, memorandum of law. In fact, when I authored it, I changed it to Cambria font because you had suggested Cambria was a font to use, and I put the line there, which I had never done before, because it looked more professional. And that is what I did, yes. I'm also learning how to make my things more professional. I can learn. I don't stay at one level.

Q. Okay, okay, okay. To what extent was your work edited by others?

A. I have two of the three people here. I read it out to Ms. Jeffalone, and she would read it because we have lots of people who are very interested, that it can be reasonably read by other people, so I read it out loud at night, in the morning, 6:00 a.m., and they would give me feedback. Same thing to my assistant Mr. Medlar. And at the last moments which we had to file, Mr. Esper gave me his feedback, which I

incorporated. That's it. No one authored it but me, period, which may be hard to believe for attorneys.

MR. CORNELL: Okay. I have no further questions.

MR. AYYADURAI: Thank you.

THE COURT: And do defendants want to ask any questions on what we've heard so far?

MR. HORNSTINE: Your Honor, just so I am clear, the Court is asking me to ask questions concerning docket 166 and that's it? Again, I'm mindful of the time.

THE COURT: No, no. 166 is the memorandum of law in support of plaintiff's claims that we've been discussing.

MR. HORNSTINE: Correct.

THE COURT: You could ask more questions, but why don't you start with that, if you want to ask any questions at all right now. And it's not going to be -- it's not speak now or forever hold your peace, but I'd like to lay the foundation for wherever we're going.

MR. HORNSTINE: Sure, I appreciate that. Again, I'm both mindful of the time, and I know the Court is mindful of my request to have the information unsealed. And again to --

THE COURT: Well, you have all the information with regard to the memorandum of law that was filed because that I had filed publicly. I thought, in fairness, you should know about the discrepancy between what Mr. Cornell wrote and what the plaintiff wrote in his affidavits yesterday and now today,

so that's all public, or the pertinent parts of Mr. Cornell I believe are public.

MR. HORNSTINE: All right. I'll have to take the Court's word for it.

THE COURT: Well, look, if you want -- and it is ten of 6:00, but we're into this, Dr. Ayyadurai, tell us -- who is Mr. Esper?

MR. AYYADURAI: Mr. Esper is an attorney that works at Harder LLP. I have known Harder LLP, and I've known Dilan when I did the case --

THE COURT: And when did you first -- did he serve as one of your attorneys in this case?

MR. AYYADURAI: No, he has not been an attorney of record. After you, Your Honor, which is on the record, said I should get an attorney, I spoke to Mr. Cornell, and I also called up Charles Harder who is a friend of mine. And I've known him for many years, and I said, "Charles, can you be ready because we may need to do depositions and discovery because the judge wants to go on an accelerated rate in California, and can you be ready and available to do that?" So they were on deck.

THE COURT: Okay. But I know that Mr. Esper didn't file an appearance, but did you feel that he was one of your attorneys in connection with this case?

MR. AYYADURAI: Well, he's been advising me on -- I

didn't see him as an attorney in this case. He's just been more of an adviser. But I wanted to get them ready in case -- as I understood, this case was going to move very fast, particularly for depositions against Twitter on the West Coast.

THE COURT: And when did you first speak to Mr. Esper about this case?

MR. AYYADURAI: Well, I think it's on the record. Shortly after you told me to talk to Mr. Cooper on May -- I forget the date -- immediately that morning, and then I had a meeting with -- I mean, I don't know -- I had a meeting with -- and it's on the record because we filed, Mr. Cooper filed a letter that we were exploring him as my attorney as well as Harder LLP. So it was around that time. When did our hearing end?

THE COURT: About May 21.

MR. AYYADURAI: It was late May.

THE COURT: Then I issued an order, because you told me about Mr. Harder and Mr. Cooper, that if they were going to represent you, they had to file an appearance by a particular date.

MR. AYYADURAI: Yes.

THE COURT: And only Todd & Weld filed an appearance. So tell me, us, please, about the preparation of the memorandum of law that you signed on July 22 and that Mr. Cornell filed on CM/ECF for you.

MR. AYYADURAI: I prepared that memorandum of law based on the notes. If you go look at that memorandum of law, it is directly from the notes I gave on May 21 on forum selection and all the four issues. I put it together. I wrote it. That's what I did.

THE COURT: What did you write it on?

MR. AYYADURAI: I wrote it in --

THE COURT: On your computer?

MR. AYYADURAI: Yeah, on the computer.

THE COURT: And did anybody else write any or all of it?

MR. AYYADURAI: No. I wrote all of it. I did read it out loud. I have Ms. Jeffalone if you want to speak to her, Mr. Medlar here, and at the very last minute or minutes I wanted Mr. Esper to review it.

THE COURT: How did you communicate with him?

MR. AYYADURAI: Over the phone and also electronically. We didn't have time to incorporate his feedback, frankly.

THE COURT: And I said to you in the closed session that, having read your submissions since about last October, this one stood out because it seemed to be written in a much more lawyerlike way than anything you've submitted to me before and since. And that raised in my mind, before I saw what Mr. Cornell said in his affidavit or independent of what

Mr. Cornell said in his affidavit, the question about whether you had actually written it. Why is the tone and literary style different in this one?

MR. AYYADURAI: Well, first of all, let me explain. I actually am not -- I actually learn, Your Honor, and I asked Mr. Cornell, "How come your things look so beautiful? What is the font you use?" He said, "Change it to Cambria."

THE COURT: I'm not talking about --

MR. AYYADURAI: No, no. Because Mr. Hornstine brought that up. He said it looks different. Then I learned how to do the introduction. I also study things. I'm not in stasis, Your Honor. In nine months, maybe I'll go to Harvard Law School and I'll also become a lawyer one day, but I have also learned. So yes, I frankly take it as a compliment.

And more importantly, I actually thought there were many errors in my thing. It was done literally with two days' notice. So if you're saying it's a great job and it's different, I take it as a great compliment.

THE COURT: Excuse me. I didn't say it was a great job. I said it was different.

MR. AYYADURAI: It is different.

THE COURT: Stop. But it's in a more helpful style. "Style" meaning style of writing, not font or format.

Now, Mr. Cornell filed an affidavit that said, as I wrote in my August 3 and 4 orders, 178 and 182, that the

memorandum of law filed on July 22, 2021, docket number 166, quote, "was written by a law firm in California that did not put its name on the memorandum. See docket number 169 Paragraph 5, ex parte and under seal."

Did you orally or in writing, including in an email, tell Mr. Cornell that the memorandum was written by a law firm in California?

MR. AYYADURAI: Never, never. Mr. Cornell was mistaken, and it was inadvertent. And you can ask Mr. Cornell directly. Mr. Cornell was scrambling on vacation. He was filing all sorts of things, affidavits, oppositions. He wrote the opposition to qualified immunity. You can ask Mr. Cornell. It's unfortunate, but what he wrote is mistaken, and it's inadvertent.

THE COURT: Okay.

MR. AYYADURAI: And I'm being --

THE COURT: Although, having testified about this, you may have waived any privilege that you would otherwise have, do you have any objection to Mr. Cornell providing to the Court and the defendants the emails that you sent him that may have caused him to be confused on this issue?

MR. AYYADURAI: It is up to Mr. Cornell, but I still want to protect my attorney-client privileges on principle. But I'm telling you, you've also heard from Mr. Esper. I wrote that, and you can -- I'll repeat it.

THE COURT: Excuse me. Neither the defendants nor I are required, when you say something -- first of all, I told you this before. When you testify about what would otherwise be a privileged communication, you waive the privilege. And then this usually happens in a criminal case, you know, somebody testifies on direct examination and then refuses on Fifth Amendment grounds to answer relevant questions on cross-examination. One remedy and a frequent remedy is to strike the testimony.

So both in the closed session and now again publicly, without objection, you said what happened. If it has to be litigated, I expect I'm going find you have no attorney-client privilege. And I would really like to get this case focused, if I don't dismiss it. And I do have a preference for cases being decided on the merits, but in my understanding from what was said in the closed session is that Mr. Cornell has some emails that prompted him to write that, even if he now knows or thinks it's mistaken. Is that right, Mr. Cornell?

MR. CORNELL: Yes, but I'd like to emphasize the part that I now know that I was mistaken. I was mistaken. The information I had was based on earlier in the development and not in the actual production. I wasn't privy to it, and I was simply mistaken.

THE COURT: But when you wrote that the memo of law was written by a law firm in California that did not put its

name on the memorandum, were you basing that on a written communication from the plaintiff?

MR. CORNELL: I was but as --

THE COURT: Excuse me, I can't hear you.

MR. CORNELL: I was mistaken. Sorry, can you hear me? Yes, that was based upon a written communication, but it was -- it's misleading and it's a mistake and I apologize.

THE COURT: What did the email say that caused you to make the mistake?

MR. CORNELL: Just a moment. My internet is not working. It just says -- it's just -- and this is why I would not like defense counsel to necessarily read it. It's a work schedule, who is going to do what, who was going to produce what -- (technical difficulty)

THE COURT: We're having trouble hearing you now. Go ahead. Can you try to say it again.

MR. CORNELL: Did you say you had trouble hearing that?

THE COURT: Yes. I didn't hear what you said.

MR. CORNELL: Okay. What I wrote in the affidavit was based upon a -- (technical difficulty) -- detail from earlier who was going to be doing what, but it didn't turn out -- (technical difficulty)

THE COURT: Well, now we have technological problems, which means --

MR. HORNSTINE: Your Honor, if I may?

THE COURT: Go ahead.

MR. HORNSTINE: Again, going to back to what I suggested earlier, there's an easy way to figure this out. Attorney-client privilege has been waived. There can be no doubt about that. Let's see the email traffic between plaintiff and Mr. Cornell. Let's see the email traffic between plaintiff and Mr. Esper. Let's see the email traffic wherein plaintiff says that he got the memorandum of law sent to him and that it was an incomplete form. These are all readily ascertainable things. We should ascertain them.

THE COURT: Sure. Here. Make your request in writing. It's now 6:15 p.m. Make your request in writing. Can you do that by about noon tomorrow?

MR. HORNSTINE: Yes, Your Honor.

THE COURT: And if that's going to be opposed -- and confer, confer.

MR. HORNSTINE: May I ask with whom should I confer with, Mr. Cornell?

THE COURT: You should confer with Mr. Cornell.

MR. HORNSTINE: Fine.

THE COURT: He represents the plaintiff.

MR. HORNSTINE: Do I need to confer with Mr. Esper who plaintiff considers an adviser in this, or is it just Cornell? I want to be perfectly --

THE COURT: I would say confer with Mr. Cornell.

MR. HORNSTINE: Very good.

THE COURT: And Mr. Esper, if he reads the transcript of this and understands the attorney-client privilege, which I expect he does, I'm confident he does, will realize that if there was an attorney-client privilege -- and there could be even if he hadn't filed an appearance -- it's been waived, voluntarily waived.

And I have a question, and whenever I have reasonable cause to have a question about the honesty of representations made to me, I've got a duty to protect the integrity of the judicial proceeding. So I raised the question, and it was raised by the contradiction.

The defendants say there's an answer. Mr. Cornell, think about all of this, and we may be able to cut through it if you share the documents without a court order and you explain, you know, amplify which you've cryptically said caused the misunderstanding. And maybe we can just move on or resolve this, whether there's sanctionable conduct here, in an efficient way. If not, we can litigate attorney-client privilege, but it's not going to take a long time. And I'm not a bit pleased with Mr. Esper's failure to appear, at all, but I think there's a good chance we'll meet Mr. Esper. Maybe he'll be here next week.

So let's go step by step. And I am doing this, I have

to reserve judgment on whether to sanction the plaintiff and, if so, what the sanction should be, including whether the case should be dismissed, but I'm not today dismissing the case. So I'm not deciding that I won't dismiss the case as a sanction. I continue to be determined to have this case further prepared so I can conduct those hearings August 25, 26, 27. I'm ordering as we've discussed --

MR. AYYADURAI: Your Honor, I have an email that I'd like to read.

THE COURT: You know what you can do? Now you're done. You're not being asked any questions. Listen to me. Listen to me. Talk to Mr. Cornell. If you've got emails, don't just read one. Talk to Mr. Cornell. Let's say let's cut through this, we have an explanation. Give them the emails because I've waived the attorney-client privilege, now that I understand it, and he can explain it to you further, I expect. Give him the emails and let's get past this.

You want to litigate the Eleventh Amendment issue. You want to make a plausible claim that the Eleventh Amendment doesn't bar this case. Now I'm going to explain to you one more time what you need to do to try to do that. Okay? So listen.

This will be memorialized, but I'm ordering that Mr. Cornell file, consistent with his obligations under Rule 11(a) and (b), among other things, a revised amended complaint

that includes only Count 6, the request for injunctive relief against Galvin and only seeks to add Twitter as a party. If you read the transcripts from May 31, June 15, you'll see that I've laid out the framework that is applicable. The defendants have made -- in fact, you have it essentially in the memos you filed, the right Eleventh Amendment standard.

One of my colleagues -- you cite another District of Massachusetts case. And there have to be allegations, not just that the plaintiff's First Amendment rights were violated. This is my understanding of the law right now. If you want to try to persuade me it's incorrect, you can. But to fit within the exception of *Ex Parte Young*, it has to be alleged not just that there was a previous violation of the plaintiff's First Amendment rights that resulted from government officials coercing with Twitter or conspiring with Twitter or collaborating closely with Twitter, so Twitter is treated like a state actor, but not only that that occurred in the past and there's a continuing harm, Dr. Shiva still doesn't have his Twitter account as far as I know, but that that coercion, conspiracy or collaboration is continuing to this day and will continue into the future.

The defendants have made, and Mr. Hornstine clarified this in the filing that was made after the May 21 hearing, I think on June 1, that the defendants make two challenges to the Court's jurisdiction because the Eleventh Amendment is a

jurisdictional issue. One is a sufficiency challenge.

The sufficiency challenge, as I understand it, the question is does the complaint on its face state a plausible claim that there is a continuing violation of the First Amendment in effect by Twitter acting as a government agent.

There is also a factual challenge. And with regard to the factual challenge, that's subject to a different standard. It's a 12(b)(1) standard. And I pointed out footnote 3 in the First Circuit's *Valentin* decision, the standard discussed by the First Circuit in *Kerns* and other cases, including the Supreme Court in *Bell v. Hood* as I recall. And there, if the basis for the factual challenge is intertwined with the merits of the case, which I tentatively perceived if there was a plausible claim it could or would be, then some discovery is appropriate. And I believe, according to those cases, I then conduct a proceeding to determine whether the exception to *Ex Parte Young* applies.

There's one other issue that I think I didn't raise. The one other way -- and I lay this out because I want to make legally correct decisions. I'm not deciding a moot court competition who is a better lawyer, but what are the merits of the case.

Just one second. What the plaintiff has alleged is that Galvin, through his agents, employees and NASED, complained to Twitter about the plaintiff, and Twitter

initially closed the account. But if they're not complaining anymore, and that's the complaint, not that there's some ongoing collaboration, coercion, the case might be moot.

But courts have held that where a state actor halts allegedly unlawful action but provides no guaranty that this moratorium will be permanent, the Eleventh Amendment does not necessarily deprive a court of jurisdiction to issue injunctive relief prescribing the challenged state action. The Seventh Circuit said that in *Vickery*, 100 F.3d, 1334, 1347-48. And there's another case, *K.P. v. LeBlanc*, 729 F.3d 427, 439, a Fifth Circuit case.

"The *Ex Parte Young* exception will apply in such circumstances unless the threat of recurrence is too remote or speculative to plausibly allege the existence of an ongoing violation of federal law," according to the Fourth Circuit in *Allen*, 895 F.3d 337, 354-55. So those, depending on the allegations, that line of cases might have some pertinence.

So Mr. Cornell, look at the transcripts, look at the orders I've issued that reference this issue, look at the Attorney General's June 1 brief. If you want -- and I've just explained to you what I think you have to do to survive a motion to dismiss the one remaining case, one remaining claim, Count 6.

With regard to Twitter and whether it's a necessary or indispensable party, there are going to be some issues, and

some of them are factual that I'm interested in. I'm trying to think how to succinctly state this. Twitter argues that there's a forum selection clause in its terms of use that the plaintiff agreed to that require that it be sued in federal or state court in San Francisco essentially and therefore it cannot be joined as a party in this case.

I've wanted to consider whether it's a necessary party since the ultimate relief the plaintiff is seeking is the restoration of its Twitter account. It might not be a necessary party, although one that I could join permissibly but for the forum selection clause possibly. It may be not necessary, I said previously, because if the plaintiff just sues Galvin in his official capacity and then proves a violation of the First Amendment because Twitter was working so closely with Galvin and NASED that it should be deemed a state actor for First Amendment purposes, I would issue an injunction if there was a threat of a continuing violation, if the plaintiff didn't get his Twitter account back, and it would run to Galvin and everybody acting in concert with him, which would include Twitter.

So on the other hand, I might -- if they're a necessary party but they can't be joined, ordinarily the case would be dismissed. However, there is authority, cases like *Bremen* and *Atlantic Marine*, two Supreme Court cases, *Atlantic Marine* is 571 U.S. 49, 64. I don't have *Bremen* at my

fingertips. But ultimately the question becomes, if Twitter were necessary and could not be sued ordinarily in Massachusetts, would the plaintiff be deprived of his day in court.

In other words, if he brought a lawsuit against Twitter in California, could Galvin be joined as a party? Is there personal jurisdiction over Galvin in California? And is there personal jurisdiction over NASED in California with regard to this case? And if not, or for some other reason, is the plaintiff effectively denied an opportunity to so litigate his claims if Twitter is not made a party here.

So that's an issue of the parties with regard to Twitter being in the case. There's also a subsidiary issue. If Galvin is protected by the Eleventh Amendment, if *Ex Parte Young* does not apply, could there nevertheless be a suit against Twitter, and does Twitter have Eleventh Amendment immunity. I think it would probably not be arguing that it does because it's not claiming to be a state actor, but it's claiming it's not a state actor. Then there are some other issues, like Section 230, Twitter's own First Amendment rights.

But basically I'll issue an order on this. If there's going to be an amended complaint filed on the 9th consistent with the requirements of the Rule 11(b) among other things and no distracting impertinent immaterial allegations, then the defendants -- it would be best, from my perspective, if the

defendants could file their motions to dismiss by Friday the 13th, but I might give you until the 20th.

MS. ELLSWORTH: Your Honor, this is Felicia Ellsworth for Twitter. We certainly would appreciate until the 20th, if that could work with Your Honor's schedule. Once we have something to shoot at --

THE COURT: All right, the 20th. And then the plaintiff is going to have to -- no, you would -- I misspoke. You would have either until the 13th or the 16th, Friday or Monday. Whose weekend is going to get wrecked?

MS. ELLSWORTH: Your Honor, we'll save your weekend if that's all right.

THE COURT: My weekend is going to be lost anyway. All right. The 16th. The plaintiff is going to have to respond by the 23rd, and that might mean that we start on the 26th rather than the 25th. I want you to leave for me the 25th, 26th and 27th. All right.

It's now 6:30. Let me briefly go into the breakout room with my staff. Actually, here. Just one second. I'm just going to talk to my law clerk. We don't have to go in the breakout room. I'll be back momentarily.

(Recess, 6:32 p.m. - 6:34 p.m.)

THE COURT: Let me do this. Mr. Cornell, I think ordinarily I'd require that you file a memorandum of law with the amended complaint addressing these issues. But I don't

issue orders, as you realize, that I don't intend to enforce. And these are complex legal issues.

So I thought I'd wait and let you respond to the motion to dismiss, although you need to be --

(Phone interruption) Hold on a second. Do you want to file a memo in support of, you know, why the allegations are sufficient, why, if there's a factual challenge, which there is, they're intertwined with the amended complaint, or do you want to just respond to the motion to dismiss?

Mr. Cornell, are you still there?

MR. CORNELL: I'm sorry. I was on mute. Can you hear me?

THE COURT: Yes.

MR. CORNELL: Yeah. I would absolutely prefer to respond in the motion to dismiss. If you wanted the complaint in the next few days, it would be --

THE COURT: Right. Okay. I'm going to put it that way. But you better not wait for the motion to dismiss. This is --

MR. CORNELL: Oh, yes.

THE COURT: This is state-of-the-art constitutional law. I've tried to lay out the framework as I understand it and have developed it, and there won't probably be time for a reply unless I read this and put the hearing off a couple of days, which would be difficult for me to do.

So you all should know what I think are the significant issues. If I've missed something, you will tell me, but you want to be sure you address what I've raised.

All right. As I said earlier, you must order the transcript on an expedited schedule, and I believe I asked that an excerpt of it be prepared on an expedited basis, so the excerpt first. And I've got a heavy schedule in the next couple of days, but you'll get orders memorializing these oral orders from me.

MR. CORNELL: Will there --

THE COURT: What's that?

MR. CORNELL: I'm sorry, I didn't mean to -- will there also be a memorandum on the dismissal of the other claims?

THE COURT: There will be.

MR. CORNELL: Okay.

THE COURT: There will be. All right. Is there anything further before we thank the tireless court reporter and my staff?

All right. We will be in recess. But if the court reporter and my staff will stay on, I'll go into a breakout room to talk very briefly. Court is in recess.

(Adjourned, 6:28 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Kelly Mortellite, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing transcript is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter to the best of my skill and ability.

Dated this 9th day of August, 2021.

/s/ Kelly Mortellite

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Kelly Mortellite, RMR, CRR

Official Court Reporter